

FCC MAIL SECTION  
Before the  
Federal Communications Commission  
Washington, D.C. 20554  
FEB 3 3 16 PM '94

MM Docket No. 92-122

In re Application of

CALVARY EDUCATIONAL File No. BRED-891103UA  
BROADCASTING NETWORK, INC.

For Renewal of License  
of Station KOKS(FM)  
Poplar Bluff, Missouri

#### MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1994; Released: February 3, 1994

By the Review Board: MARINO (Chairman).  
BLUMENTHAL and GREENE.

1. The Board has before it the *Initial Decision*, 8 FCC Rcd 4789 (1993)(*I.D.*), of Chief Administrative Law Judge Joseph Stirmer (ALJ). It also has before it the exceptions to the *I.D.* filed by the Commission's Mass Media Bureau. In brief, the *I.D.* granted a short-term (1-year) renewal to the above-captioned noncommercial FM station and assessed a

\$10,000 forfeiture against the licensee (Calvary) for multiple violations of 47 CFR § 73.318 (FM blanketing interference rules).<sup>1</sup>

#### BACKGROUND

2. Calvary applied for its construction permit in March 1987. Essentially a "mom and pop" venture consisting of Mr. and Mrs. Donald Stewart, KOKS-FM (including the transmitter tower) was constructed on land at their personal residence. No sooner had the station commenced broadcasting under FCC Program Test Authority on October 6, 1988 than complaints of signal interference to other television and radio channels were lodged by residents whose homes were located in the vicinity of the new station.<sup>2</sup> Section 73.318(b) of the Commission's Rules provides, however (emphasis added):

After January 1, 1985, permittees or licensees who either (1) commence program tests, or (2) replace their antennas, or (3) request facilities modifications and are issued a new construction permit *must satisfy all complaints of blanketing interference which are received by the station during a one year period.* The period begins with the commencement of program tests, or commencement of programming utilizing the new antenna. *Resolution of complaints shall be at no cost to the complainant.* These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers, improperly installed antenna systems, or the use of high gain antennas or antenna booster amplifiers. Mobile receivers and non-RF devices such as tape recorders or hi-fi amplifiers (phonographs) are also excluded.

<sup>1</sup> Because of unresolved FM blanketing interference complaints and the licensee's responses to those complainants and to the FCC, the licensee's renewal application was designated for hearing on the following issues:

1. To determine whether Calvary Educational Broadcasting Network, Inc. violated Section 73.318 of [the] Commission's Rules, 47 CFR Section 73.318 (FM blanketing interference), and, if so, the nature and extent of this violation;
2. To determine whether Calvary has misrepresented facts or lacked candor in its statements to the Commission regarding the extent and success of its efforts to correct the blanketing interference problems;
3. To determine whether the licensee's management and operation of Station KOKS was so negligent, careless, or inept, or evidenced such disregard for the Commission's rules, that it cannot be relied upon to fulfill the responsibilities imposed upon it;
4. To determine, the light of the evidence adduced pursuant to the preceding issues, whether or not grant of the subject license renewal application would serve the public interest, convenience and necessity.

Hearing Designation Order, 7 FCC Rcd 4037 (1992).

<sup>2</sup> The *I.D.* (at para. 12) reports:

Before KOKS began broadcasting, residents of the area near the KOKS tower generally were able to watch WPSD-TV, Channel 6, Paducah, Kentucky; KAIT-TV, Channel 8, Jonesboro, Arkansas; KFVS-TV, Channel 12, Cape Girardeau, Missouri; and KPOB-TV, Channel 15, Poplar Bluff (MMB Ex. 2, p.1; MMB Ex. 3, pp. 1-2; MMB Ex. 4, p.2). Residents were also able to listen to a number of FM radio stations, including KJEZ and KKLK. Shortly after KOKS went on the air on October 6, 1988, Calvary began to receive telephone calls from persons complaining that KOKS was causing interference to their reception of television and radio. Among the persons who called the station to complain were Doris Smith, Irma Jean Hillis (hereinafter Jean Hillis), Dairiel L. Denton, Jr., Clyde Freeman, Joanne Gray, Randy Soens, and Marie Christian. (Tr. 409; Calvary Ex. 3, p.3; MMB Ex. 3, p.3; MMB Ex. 4, p.3; MMB Ex. 6, p.3; MMB Ex. 7, p.3.) Many residents complained about severe KOKS interference to reception of Channel 6. Moreover, many of those persons were no longer able to watch Channel 8. Complainants also alleged to a lesser extent that KOKS was interfering with reception of Channels 12 and 15 and with reception of FM radio. (Tr. 409, 907, 977, 993; MMB Ex. 2, p.2; MMB Ex. 3, pp.2-3; MMB Ex. 4, p.2; MMB Ex. 5, p.2; MMB Ex. 6, p.2; MMB Ex. 7, p.2; MMB Ex. 8, p.2; MMB Ex. 9, p.2; MMB Ex. 10, p.2; MMB Ex. 17, pp.11-29, 33-37, 40-42, 46-48, 54; MMB Ex. 19, pp. 6-37, 59-68, 71.)

3. But, as the ALJ noted, the Stewarts -- theretofore farmers in the "egg-laying" business -- had no prior broadcast experience and:

[w]hen complaints about KOKS interference began, Calvary's principals did not know what to do and no provisions, either with respect to money or personnel for dealing with blanketing interference complaints, had been made. No one at Calvary had any prior experience resolving such complaints. Calvary did not even know what its obligations were, because it did not possess a copy of the Commission's Rules. (Tr. 365, 393, 406, 413, 428, 723, 726, 731.)

*I.D.* at para. 13. Nearby neighbors allegedly receiving interference to preexisting television and radio signals initiated a petition campaign, and referred more than 150 signed complaint forms to the FCC's Kansas City Field Office in late 1988. *See id.*, para. 15. In turn, the Field Office referred the complaints back to KOKS, along with instructional materials (including specifically described filters and installation diagrams) to assist the licensee in resolving the interference complaints. *See Bureau Exceptions* at 5.

4. Without repeating all of the findings of fact further detailed by the ALJ in paras. 19-86 of the *I.D.*, findings unchallenged by either party, we summarize the ensuing history as follows. Obviously without the financial or technical resources to fully respond to the interference complaints that ultimately numbered more than 200 from residents living within 2.5 miles of the new FM radio station, Calvary did make some "limited" efforts to resolve the complaints. The Stewarts themselves, often accompanied by local TV repair shop owner and KOKS contract engineer Charles Lamp, personally visited almost every complainant. In part because of a misunderstanding of the obligations of § 73.318 and in part because of "economical reasons," *see I.D.* at para. 104, the licensee has never been (and is not yet) in compliance with § 73.318. There is also no doubt upon this record that many of the interference complaints were not resolved because the licensee, in disregard of the technical advice provided by the Kansas City Field Office, (1) continued to respond to interference complaints with inexpensive and ineffective filters (*see, e.g., I.D.* paras. 26, 38); and (2) limited the installation of filters to only one TV set per complaining household for lack of adequate resources. *Id.*, paras. 62-63.<sup>3</sup>

5. By way of further explanation, however, the record also reflects some of the difficulties (and, perhaps, mitigating circumstances) that confronted the licensee in coming

into "strict" compliance with § 73.318. First, whereas the rule calls upon a permittee (or licensee)<sup>4</sup> to "satisfy all complaints of blanketing interference," it appears that several of the Stewarts' neighbors may be all but impossible to "satisfy" since they have objected to the station from the outset primarily on aesthetic grounds. *See I.D.*, para. 10 (complaints of neighbors Doris Smith and Irma Jean Hill). Moreover, as will be discussed further hereinbelow, there are extrinsic conditions that may well work against strict compliance in the current case, if § 73.318(b) is interpreted literally.

6. In that regard, a second complicating factor is that, although as many as 60% of the complaints against KOKS concerned alleged interference to the local, off-the-air reception of WPSD-TV, Channel 6, Paducah, Kentucky, the licensee was advised by its counsel as well as an FCC Field Office official that KOKS had no duty to alleviate interference to local reception on Channel 6, since the interference was beyond the Grade B signal contour of that distant Kentucky television station. In fact, an April 27, 1990 letter from the Commission to KOKS advised that the FCC had made "no final determination in this [KOKS] case concerning the types of service interruptions that fall within the ambit of the Commission's rules, 47 CFR 73.318." *I.D.* at para. 108 (quoting FCC letter). In further fact, unchallenged by the Bureau, are the assertions of the licensee and the ALJ that the belated policy determination that Calvary *did* have a duty to correct interference caused to reception of the Paducah, Kentucky television signal (beyond that distant TV station's Grade B contour) was promulgated for the first time in the 1992 *Hearing Designation Order* commencing this very case. *See I.D.*, para. 108; Calvary Reply at 4-5.<sup>5</sup>

7. Besides the Bureau's three-and-a-half year indecision on the applicability of § 73.318 to Paducah's TV Channel 6, the ALJ reports that in December 1989 FCC Field Office personnel visited the homes of various KOKS complainants. *See I.D.*, paras. 49-53. The FCC's field engineer, Michael Moffet, found that while in some homes the interference to various television and radio channels was reduced somewhat when KOKS was *not* transmitting, (1) off-the-air reception of television channels other than Channel 6 (*i.e.*, Channels 8, 12, 15 and 39) was mediocre to poor in general; (2) "there are additional reasons [unrelated to KOKS] for poor television reception" in the relevant locale; and (3) interference to FM radio reception "was not a major concern of the complainants."

8. In any event, by letter of October 30, 1990 the Bureau's Audio Services Division issued an *Order* requiring KOKS to "restore service" to as many as 220 unsatisfied

<sup>3</sup> Indeed, the licensee has made no effort whatever to come into compliance since the 1992 issuance of the *Hearing Designation Order*, because it is "unreasonable to expect the station to undertake an expensive and extensive effort ... while engaging in a renewal hearing." *I.D.* at n.20.

<sup>4</sup> Although the agency was aware of the numerous 1988 complaints of blanketing interference outstanding against KOKS while the station held a mere construction permit, it nonetheless granted Calvary's (September 6, 1988) application for a full broadcast license on January 4, 1989.

<sup>5</sup> Because the Bureau declined to determine, or advise Calvary, that § 73.318 applied to interference to the distant Paducah TV Channel 6, the ALJ concluded that "KOKS cannot be faulted for its [prior] failure to correct blanketing problems affecting

Channel 6." *I.D.* at para. 108. We agree. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987)(regulatee entitled to adequate notice of duties).

<sup>6</sup> FCC Kansas City field engineers made a second visit to 14 Poplar Bluff complainants. Their report also concluded (1) "the complainants were attempting to receive stations that were 68-86 miles distant and separated by up to 174 degrees, resulting in a very low signal reaching the television receiver to begin with"; (2) that many of the KOKS-supplied filters appeared to stop working a few weeks after installation; *but* that (3) "the installation of filters, coax cable and other equipment leads to a loss in the signal reaching the television set..." *I.D.* at para. 68 (*emphasis added*). Although this second pair of FCC engineers likewise found generally poor off-the-air television reception even when KOKS was *not* broadcasting, and could not at other

complainants within 120 days of its *Order* and to submit progress reports every 30 days. *I.D.*, para. 57. In response, Calvary sent a questionnaire to many complainants inquiring as to which channels were experiencing interference. *id.*, para. 58, but the licensee sent no questionnaire to complainants whose problems the licensee had reported as previously cured. *id.*, para. 59. As indicated earlier, Calvary's principals then visited almost all of the 105 homes it regarded as having unresolved interference complaints, and attempted to satisfy the complainants with a "limited" number of inexpensive and ineffective filters. Calvary also advised some complainants that the complainants themselves were required to buy the recommended filters. See *id.*, paras. 62-63. It then reported back to the FCC in February 1991 as follows:

Calvary stated that the Microwave filter it had used and installed, the FAS-Trap 5K FM-89.5, eliminated FM blanketing interference caused by KOKS. Calvary also claimed that it went beyond the Commission's requirements by eliminating FM blanketing interference to Channel 6. Finally, Calvary stated that the average cost per home visit was \$65.00. The reports were silent as to the number of television sets per residence it had serviced and as to whether any filters had been installed on complainants' radios. (MMB Ex. 26, p.1; MMB Ex. 27, p.1).

*I.D.* at para. 64. However, (*id.*, at para. 65):

The reports submitted to the Commission by Calvary were furnished to some of the complainants and Smith, Jean Hillis, Beckham, and Fred and Marie Ellis, among others, specifically disputed Calvary's claims that their service had been restored. (MMB Ex. 2, pp. 27-28; MMB Ex. 3, pp. 4-5; MMB Ex. 9, pp. 6-7; MMB Ex. 30, pp. 5-6.) In addition, Sandra Durbin, Clara Freeman, Joanne Gray, Mary Wynn, and Leatha Piper pointed out that their complaints had not even been addressed by Calvary during the licensee's 1991 visits to restore service. (MMB Ex. 5, pp. 14-15; MMB Ex. 6, pp. 8-9; MMB Ex. 7, pp. 14-15; MMB Ex. 10, pp. 18-19; MMB Ex. 29, pp. 9-10). Finally, Marie Christian complained that, although she had three television sets, Calvary installed a filter on only one set. (MMB Ex. 1, p. 49.) Except with respect to Wynn, Calvary does not appear to have responded to the complaints noted above or that it attempted any further repairs. (Tr. 536-537.)

times determine whether the perceived interference (*viz.*, "snowy" pictures) was KOKS-related, the field engineers reported that Calvary had failed to "restore" television and/or FM radio service to a number of complainants. See *id.*, at paras. 69-84.

<sup>9</sup> *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966) (Board bound by Hearing Designation Orders).

<sup>8</sup> Although the cited decision ordered the licensee to come into compliance by resuming broadcasting on noncommercial television station KQEC-TV within 90 days, upon reconsideration the licensee was permitted an additional 9 months to comply because of "financial strain" on the licensee. *KQED, Inc.*, 58 FCC 2d 751, 752 (1976).

<sup>9</sup> Because of Calvary's failure to fully comply with § 73.318 and because it believes that the licensee's responses to the FCC regarding the alleged "satisfaction" of a number of individual interference complaints amounted to misrepresentations or lack of candor to the Commission, the Bureau here argues that the ALJ erred in granting even a short-term renewal of the license of KOKS. Whereas the ALJ found no deliberate deceit on the part of Calvary, see *I.D.*, para. 116, the Bureau asserts numerous instances where the licensee either inaccurately reported to the FCC that it had satisfied a particular interference complaint or failed to correct such reports once advised that the complainant remained unsatisfied. See Bureau Exceptions at 8-19. In response, Calvary submits that the Bureau overlooks the mitigating evidence and that most (if not all) of the disputes over "restoration" of service reports to the FCC centered on the licensee's (previously undetermined) duties as to Channel 6 television reception.

### DISCUSSION

10. At the outset, we make three controlling points: *first*, irrespective of the "mitigating evidence," this Board has no alternative but to find upon this record that KOKS has not fully complied with the literal requirements of § 73.318; *second*, insofar as the (belated) determination that KOKS is required to "satisfy" complaints of interference to television Channel 6, this Board is squarely bound by the determination as set forth in the *Hearing Designation Order*; and, *third*, the financial inability of a licensee to comply with Commission rules is an unacceptable defense for noncompliance. See *United Television Co.*, 40 FCC 2d 472 (1973) (subsequent history of license loss omitted); accord *KQED, Inc.*, 57 FCC 2d 264, 269 (1975) (subsequent history omitted).<sup>8</sup>

11. Given those three operative principles, and even assuming *for instant purposes only* that the ALJ's conclusions on the misrepresentation and candor issues are entitled to affirmation,<sup>9</sup> the Board must agree with the Bureau that -- upon this record -- "there is no indication that Calvary will comply with the rule [§ 73.318] if given another opportunity,"<sup>10</sup> at least insofar as the Bureau regards compliance. Unless and until Calvary demonstrates that it is technically and financially qualified (see 47 U.S.C. § 308(b)),<sup>11</sup> the Board sees little purpose in granting a renewal, hence risking the perpetuation of continued noncompliance and yet further enforcement proceedings initiated by an obviously unsatisfied Mass Media Bureau.

12. Thus, without denying the considerable difficulties involved in achieving strict compliance with § 73.318 -- as reflected clearly in the reports of the Commission's Kansas

<sup>9</sup> An ALJ's credibility findings are entitled to great weight, see, e.g., *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985).

<sup>10</sup> Bureau Exceptions at i.

<sup>11</sup> The Board recognizes that no financial issue was designated against Calvary. However, the record here, and the ALJ's findings based thereon, ineluctably raise substantial and material questions as to Calvary's financial ability to operate in compliance with FCC technical rules. Again, financial hardship is an unacceptable basis for continued noncompliance. Compliance must precede renewal. *United Television Co.*, *KQED, Inc.*

City FOB engineers -- the Board is constrained to require from the licensee (1) a written showing of the measures it proposes to take to come into full compliance with § 73.318, including a detailed time schedule of proposed actions; and (2) a written showing of the licensee's finances sufficient to demonstrate that it possesses the resources necessary to achieve full compliance with § 73.318. These two written showings shall be filed with the Board no later than twenty (20) days from the public release of this *Memorandum Opinion and Order*. The Bureau shall then be provided fifteen (15) days to reply to, or comment upon, the licensee's showings. Upon review of these materials, the Board will take whatever action on the license renewal application it regards as appropriate.<sup>12</sup>

13. ACCORDINGLY, IT IS ORDERED. That Calvary Educational Broadcasting Network, Inc. SHALL FILE within twenty (20) days of the release of this *Memorandum Opinion and Order* the written documentation specified in paragraph 12 above; and That the Mass Media Bureau MAY FILE comments within fifteen (15) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal  
Member, Review Board

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<sup>12</sup> Nothing, of course, precludes meetings on these matters between the licensee and the Bureau, or the possibility of a negotiated resolution of this proceeding, should the parties desire to enter a mutually satisfactory consent agreement.